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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~894~~ 39

THE UNITED STATES,
Petitioner,

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

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No. 624

THE UNITED STATES,

Petitioner,

v.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Claims is found at pp. 14-25, inclusive, of the record, and in Vol. 81 F. Supp. 237 of the reports.

Statement of Case

The War Shipping Administration appropriated from respondent, pursuant to the Merchant Marine Act of 1936 (46 U. S. C. 1242), its railroad car ferry "Maitland No. 1" (Finding 2; R. 4) and fixed $72,500 as fair value (Finding 3; R. 4). Respondent notified petitioner that said sum was unsatisfactory, and that it elected to receive 75 per

centum thereof, and to institute action to recover such further sum, as added to said 75 per centum, would constitute just compensation for the property taken (Finding 4; R. 4).

The Commissioner of the Court of Claims, before whom the issues were tried, found and reported the sum of $182,900 as the value of the Maitland at the time of requisition (R. 14). The Court of Claims, however, found the value of the Maitland was $161,833.72 (Finding 22; R. 14).

The only issue was the question of value at the time of appropriation by the War Shipping Administration. Finding that there was no current demand for a car ferry on the Great Lakes (Finding 18; R. 10) the Court considered the evidence of demand for such vessels at Florida and Gulf ports (Finding 20; R. 11) and predicated its award on the demand and market at such points with appropriate adjustment for the cost of transfer from the mooring on the Great Lakes to the area of demand. The Court fortified its conclusion by recourse to the record of past earnings (R. 23).

Although between 1936 and 1942 six Great Lakes' car ferries had been sold, the Court of Claims found that when sold they were obsolete for use as railroad car ferries; and were purchased for conversion to secondary uses, such as bulk carriers and highway ferries (Findings 18, 19, 21; R. 11, 14). The Court of Claims also found that such vessels when sold did not compare in age, physical condition, repairs required, and care with the Maitland (Findings 19, 21; R. 11, 13).

The Court also found that in June 1942, the United States acquired, by requisition from Florida East Coast Car Ferry Company, two car ferries, the Joseph R. Parrott and the Estrada Palma, which plied between Florida and Cuba, for a consideration of $665,000 for both, or $332,500 for each, fixed by the parties by open negotiation

and agreement, without recourse to litigation. These vessels were comparable in age, size, dimensions, engines, power, boilers, auxiliaries and type of construction with the Maitland (Finding 20; R. 12). As a means of establishing the value of the Maitland by the market value method, the Court found that these transactions furnished close equivalents (R. 21).

During the 16 year period of her operation by respondent the Maitland earned an average annual net profit, before taxes, of $42,816.36, a return of 10.41 per centum on investment (Finding 10; R. 6), and said sum when capitalized at 10 per cent for twenty-four years, the unexpired normal life remaining to the Maitland at the time of requisition, with a residual value of $50,000 at the expiration of such period, amounted to $389,767.15 (R. 23), an approximate equivalent to the sums paid by the United States for the ocean car ferries Joseph R. Parrott and Estrada Palma (R. 24). The Court found it necessary to consider the capitalization of net earnings of the vessel during the period of its operation in conjunction with the aforesaid contemporaneous transactions in vessels of close similarity in order to ascertain a fair value for the Maitland at the time of requisition (R. 23).

The Court's computation of such value was made as follows (R. 24):

Sound value for salt water operation		$389,767.15
Less adjustments for:		
20% shorter life in salt water	$ 77,953.43	
Cost of repairs	34,980.00	
Cost to move to Florida and convert to salt water use ..	115,000.00	
Total of adjustments		227,933.43
Value of time of requisition		$161,833.72

Since its last service as a freight car ferry across Lake Erie, the Maitland was carefully maintained; the Captain and Chief Engineer remained aboard as shipkeepers; steam was maintained and the engine turned over periodically; the marine engine and all auxiliaries were lubricated; the bright work was greased; additional help was hired when necessary, and minor repairs to prevent deterioration were made as required (Finding 13, R. 8).

The petitioner rested its claim that the value of the Maitland was $72,500, as administratively determined by it, solely on the bare evidence of the sales involving the six obsolete Great Lakes car ferries, unfortified by supporting evidence, by expert opinion or otherwise, to demonstrate how the value of $72,500 had been reconciled with the varying factors of age, physical condition, care and maintenance supplied, differences in size, power, machinery, auxiliaries, and equipment, repairs required to restore to sound and seaworthy condition, not to mention the difference in the prices realized from such sales, and the varying factor of scrap value ranging from the sum of $13,500 at the time of requisition to a sum ranging from $64,000 to $100,000 at the time of trial.

Four opinions of value were given by expert marine appraisers at the trial, two for petitioner, and two for respondent. Each of these four experts rejected the six sales as criteria for determining value by the market value method, and instead, based their opinions on other factors. One expert for the Government appraised the value of the Maitland at $145,000 at the time of requisition, based upon an estimated cost of reproduction at that time of $1,310,000 with a generous deduction for depreciation (S. M. 823-6; 842-50). The Government's other expert appraised the value of the Maitland at time of requisition at $152,400 predicated upon market value established by the transactions involving three salt water car ferries acquired by the United States (S. M. 477; 507; 526-38).

Obviously, as the Court said, the Maitland "had a value in excess of the value of [the six] obsolete car ferries even though it was not in actual operation in 1942" (R. 23).

Argument

1. It is not the function of the public representative, whether legislative or administrative, "to say what compensation shall be paid, or even what shall be the rule of compensation" (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327). "The ascertainment of compensation is a judicial function" (*United States* v. *New River Collieries*, 262 U. S. 341, 343-4). The burden was not on respondent, as petitioner contends (Pet. Br. p. 15; item 8), to show that the tendered price of $72,500 set by the Maritime Commission was incorrect. It is enough that the property owner, the respondent here, has proved the value of his appropriated property (*United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U. S. 266, 273).

2. When, because of factors special or peculiar to the situation, as in this case, there is no evidence of proper sales at the place of requisition by which to establish value, resort may then be had to other methods and other evidence to establish the value of the property taken (*United States* v. *Miller*, 317 U. S. 369, 374; *Washington Water Power Co.* v. *United States*, 135 F. (2d) 541, 542).

The Court considered, (1) the demand for vessels such as the Maitland as a salt water car ferry between Gulf and Florida ports and Cuba, (2) the prices paid by the Government for comparable vessels in that service; and (3) the capitalized earnings of the Maitland. On this premise the Court concluded that these factors, with due allowance for repairs, depreciation and cost of transfer, resulted in a value of $161,833.72.

3. Petitioner's claim that the Court of Claims erred in failing to apply value at the place of taking in determining the value of the Maitland (Pet. Br. p. 14; Item 3), is but a refinement of its main argument that value should have been measured solely by the prices realized from the sales of the six obsolete Great Lakes car ferries. Implicit in such claim, as with petitioner's main contention, is a denial of the validity of the Court's finding of fact that the prices realized from the sales of the six obsolete car ferries represented value for a secondary and degraded use of the Maitland rather than the highest, most profitable use for which it was suitable and adaptable (R. 23).

4. By Executive Order number 9387, dated October 15, 1943 the President appointed an advisory board to establish rules for the guidance of the War Shipping Administration in determining the just compensation to be paid for requisitioned vessels (8 Fed. Reg. 14105). The Advisory Board in its report made on December 7, 1943 stated, among other things, that just compensation should not include enhancement due to the Government's need of vessels which had necessitated the taking (Rule 4). The United States paid the owner of the Joseph R. Parrott and the Estrada Palma on June 2, 1945 (S. M. 536) and unquestionably, pursuant to the report of the Advisory Board, such payment excluded anything for enhancement. The value of the Maitland, based upon such prices, likewise excluded anything for enhancement. No deduction for enhancement need be made from a value which itself excludes anything for enhancement. The Court of Claims very properly refused to make any deduction for enhancement from the value which it had fixed for the Maitland.

5. Petitioner's brief (pp. 22, item b) suggests the pendency of other appropriations of Great Lakes vessels as affected by the determination in this case. So far as is known and so far as appears none of the other cases in-

volves a railroad car ferry, and obviously, there is no similarity in the elements or factors on which the value of the Maitland was determined.

CONCLUSION

The application for a writ of certiorari should be denied.

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